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1 violation of published rules for Appellant allegedly engaging in unacceptable and unwelcome
2 behavior toward a female co-worker.

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4 1.4 **Citations Discussed.** WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084
5 (1983); Johnson v. Lower Columbia College, PAB No. D93-077 (1994); Holladay v. Dep't of
6 Veterans Affairs, PAB No. D91-084 (1992); McCurdy v. Dep't of Social & Health Services, PAB
7 No. D86-119 (1987); Rainwater v. School for the Deaf, PAB No. D89-004 (1989); Skaalheim v.
8 Dep't of Social & Health Services, PAB No. D93-053 (1994); Countryman v. Dep't of Social and
9 Health Services, PAB No. D94-025 (1995); Aquino v. University of Washington, PAB No. D93-
10 163 (1995).

11 12 II. MOTIONS

13 2.1 At the outset of the hearing, Appellant moved to exclude evidence from witnesses named by
14 Respondent that were not disclosed in a timely manner and to limit the evidence to events that
15 occurred on or about June 19, 1996.

16
17 2.2 Appellant argued that on April 11, 1997, Respondent responded to Appellant's first set of
18 interrogatories and named 3 individuals who had knowledge of the alleged misconduct. Appellant
19 asserted that Respondent supplemented its response on February 13, 1998, and named 30 additional
20 individuals who had knowledge of the misconduct. Appellant argued that providing the names of
21 the additional individuals only a few weeks before the hearing did not allow Appellant sufficient
22 time to interview the individuals and to complete discovery prior to the hearing.

23
24 2.3 In addition, Appellant argued that in his first interrogatory number 9, he asked for the dates
25 and times of the alleged actions by Appellant toward the complainant, Victoria Dickson. Appellant
26

1 argued that on April 11, 1997, Respondent responded to the interrogatory and stated "On or about
2 June 19, 1996." Appellant asserted that Respondent supplemented its response on February 13,
3 1998, and stated "Concurrent with the reporting of the June 19, 1996, incident, the victim reported
4 numerous and ongoing incidents over the previous years and prior to the June 19, 1996, incident."
5 Appellant argued that providing this information only a few weeks before the hearing did not allow
6 Appellant sufficient time to complete discovery on the incidents that allegedly occurred prior to
7 June 19, 1996, before the hearing. Therefore, Appellant moved to exclude any evidence of
8 misconduct that may have occurred prior to the events that allegedly occurred on or about June 19,
9 1996.

10
11 2.4 Respondent argued that originally the appeal was assigned to an assistant attorney general
12 other than Ms. Stambaugh, who represented Respondent at the hearing. Earlier this year when Ms.
13 Stambaugh began working on the appeal, she began attempting to uncover the names of individuals
14 who might have knowledge of the case. After reviewing the file, Ms. Stambaugh provided the
15 supplemental response containing the names of the 30 additional individuals. In addition, Ms.
16 Stambaugh supplemented the answer to interrogatory number 9. Respondent also argued that
17 Appellant had access to the files used by Ms. Stambaugh when she completed the supplemental
18 response and could have discovered this information from the files.

19
20 2.5 The Board took the motion under advisement and hereby grants the motion in part. The
21 motion is granted in regard to the disclosure of the names of the 30 additional individuals having
22 knowledge of the alleged misconduct. Therefore, the testimony is excluded of individuals named in
23 the supplemental response and called as witnesses for Respondent. The motion is denied in regard
24 to interrogatory number 9. This Board has historically limited its decisions on disciplinary appeals
25 to the incidents identified in the letters of discipline. Appellant was aware of the incidents
26

1 identified in the letter. The disciplinary letter refers to specific acts of alleged misconduct that were
2 ongoing and that occurred prior to June 19, 1996. Therefore, we do not find that Appellant was
3 prejudiced in preparing for this appeal by Respondent's incomplete answer to Appellant's first
4 interrogatory number 9.

5
6 2.6 At the close of Respondent's case in chief, Appellant moved to dismiss the appeal for
7 Respondent's failure to comply with the provisions of the collective bargaining agreement.
8 Appellant asserted that the collective bargaining agreement required that a complete investigation
9 be conducted prior to any disciplinary action being taken. Appellant argued that the alleged
10 misconduct first came to Respondent's attention on June 20, 1996, that Ms. Dickson filed a
11 complaint the WSU Center for Human Rights on July 3, 1996. Then the appointing authority
12 interviewed Ms. Dickson on July 11, 1996, and a pre-disciplinary meeting was held on July 12,
13 1996. Appellant further argued that the appointing authority did not begin his investigation until
14 July 18, 1996. Appellant was dismissed four days later, on July 22, 1996. Appellant asserted that
15 when he was dismissed, Respondent's Center for Human Rights was still in the process of
16 conducting its investigation. Therefore, Appellant argued that he was dismissed before the
17 investigation was completed.

18
19 2.7 Respondent argued that Appellant was dismissed based on the information gathered during
20 the investigation conducted by the appointing authority. Respondent asserted that the WSU Center
21 for Human Rights was a separate entity within the University and was not responsible for
22 terminating employees outside of their chain of command. Respondent argued that Appellant failed
23 to show any prejudice to Appellant by the alleged violation of the collective bargaining agreement.

1 2.8 The Board took the motion under advisement and hereby denies the motion. The appointing
2 authority's investigation of the alleged misconduct was independent from and for a different
3 purpose than the investigation conducted by the WSU Center for Human Rights. We do not find
4 that the simultaneous investigation by the WSU Center for Human Rights precluded the appointing
5 authority from taking a personnel action based on the results of his investigation.

7 **III. FINDINGS OF FACT**

8 3.1 Appellant William Lawson was a Custodian and a permanent employee for Respondent
9 Washington State University (WSU). Appellant and Respondent are subject to Chapters 41.06 and
10 41.64 RCW and the rules promulgated thereunder, Titles 251 and 358 WAC. Appellant filed a
11 timely appeal with the Personnel Appeals Board on July 26, 1996.

12
13 3.2 By letter dated July 22, 1996, Respondent notified Appellant of his immediate dismissal for
14 gross misconduct, mistreatment or abuse of a fellow worker, neglect of duty, insubordination, and
15 willful violation of published University rules, policies and regulations. The letter of dismissal
16 states as follows:

17 Specifically, the reason for your immediate dismissal is because of your misconduct
18 which occurred on or about the afternoon of June 19, 1996, when you were found in
19 the Linen Room in Streit-Perham sniffing the pants of a female co-worker, Victoria
20 Dickson, that she had just removed during her change of clothes at the end of the
21 shift. Furthermore, your immediate dismissal is also because of your ongoing
22 misconduct related to Ms. Dickson which cannot and will not be tolerated at
Washington State University. Ms. Dickson reports that this misconduct took place
on an ongoing basis, "all of the time," and as recently as May 1996, despite her
indications to you that such conduct toward her was unwelcome.

23 This additional misconduct involved such incidents as repeatedly bumping up
24 against Victoria and feeling her body, looking down her bra, sitting in a chair with
25 your arms and legs spread apart and saying "come on baby," getting down on your
26 hands and knees with your face immediately behind her posterior when she was
down on her own hands and knees cleaning, turning out the lights in bathrooms
while she was still there working, and following her. All of these incidents and your

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statement that you might “blow away” a supervisor, Tony Rogers are unacceptable conduct at Washington State University.

(Exh. R-1).

3.3 Victoria Dickson is a Custodian and was a co-worker of Appellant’s during the time of the alleged incidents. On June 19, 1996, Ms. Dickson and Appellant were working in the Streit-Perham building. Toward the end of the day, Ms. Dickson asked Appellant if he would give her a ride to the time clock. Appellant said he would. Ms. Dickson told Appellant that she wanted to change her clothes before leaving and he told her that would be fine. While Appellant waited for her, Ms. Dickson changed her clothes in the room that the Custodians were using as a linen room. The room was located adjacent to the ground floor study of Perham. Ms. Dickson saw a student with whom she wished to speak walk by outside the building. Ms. Dickson left her clothes in the linen room and went to talk to the student. When Ms. Dickson returned to the linen room, she found Appellant holding her pants to his face and sniffing them. Ms. Dickson testified that when she saw Appellant, he ran away. She testified that she ran after him and yelled at him saying, “You son of a bitch, *asqueroso*, you filthy animal and all kinds of names.” (Testimony of Victoria Dickson).

3.4 Ms. Dickson testified that she was very angry. Following the incident, she rode with Appellant to the time clock. Ms. Dickson was still upset when she got home after work. Her husband asked her what was wrong and she told him what had happened. Ms. Dickson said that her husband became very angry and told her that if she did not report incident, he would call her supervisor. She told him to forget about it, that she would take care of it. The next morning her husband called her at work. He asked her if she had talked to her supervisor. She told him that she had even though she had not. She then called her supervisor, Lori Burnham, and told her that if Ms. Dickson’s husband called, please tell him that they had taken care of the problem. Ms. Dickson was

1 afraid that her husband might come to her work site and start a fight. (Testimony of Victoria
2 Dickson).

3
4 3.5 Ms. Burnham testified that Ms. Dickson appeared to be very upset about something that Ms.
5 Dickson did not want her husband to disclose to Ms. Burnham. Ms. Burnham wanted to know what
6 was wrong. Ms. Dickson agreed to tell her and asked Ms. Burnham not to tell anyone. Ms.
7 Dickson then told Ms. Burnham about the incident with Ms. Dickson's pants and about past
8 incidents of inappropriate behavior by Appellant. (Testimony of Lori Burnham).

9
10 3.6 Ms. Burnham felt that it was her duty to report the conduct to her supervisor, Bob
11 Tattershall, which she did. (Testimony of Lori Burnham). The next day, Ms. Burnham took Ms.
12 Dickson to meet with Mr. Tattershall. After Ms. Dickson told Mr. Tattershall what had happened,
13 Ms. Dickson met with Liane Taylor of the WSU Center for Human Rights. Ms. Dickson then met
14 with Ernest Renfro, Assistant Vice President for Business Affairs and Controller. (Testimony of
15 Victoria Dickson).

16
17 3.7 Ms. Dickson testified that she told Ms. Burnham, Mr. Tattershall, Ms. Taylor and Mr.
18 Renfro the same story because she had nothing to lie about. On July 3, 1996, Ms. Dickson filed a
19 formal complaint with the WSU Center for Human Rights. (Testimony of Victoria Dickson and
20 Exh. A-3).

21
22 3.8 The Center for Human Rights conducted an investigation which was concluded on
23 December 31, 1996, after Appellant was terminated. Liane Taylor of the Center for Human Rights
24 sent a letter to Ms. Dickson in which she found, in part:

25 The incident that occurred on June 19, 1996 was not witnessed by anyone. The
26 stories are conflicting and I am unable to make a factual determination regarding this

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1 incident. As it relates to inappropriate behavior, the people interviewed indicated
2 that both Mr. Lawson and you have acted inappropriately on several occasions.

3 In addition, there was a complaint that you filed against another woman custodian,
4 alleging that she sexually harassed you. However, you later informed your
5 supervisor that the allegation was false. This is important to note and is important in
6 assessing credibility.

7 Mr. Lawson himself stated that he may have sat with his legs spread and said
8 "Come-on baby" to you although he indicated that it was done in response to your
9 actions. Whether or not you made any comments or actions, Mr. Lawson's response
10 was clearly inappropriate."

11 (Exh. A-3).

12 3.9 There are bathrooms in the Streit-Perham building. The Custodians normally use a
13 bathroom that is downstairs in the building. However, on June 19, 1996, Ms. Dickson chose to
14 change her clothes in the linen room rather than in the bathroom. (Testimony of Victoria Dickson).

15 3.10 Ms. Dickson testified that long before the incident with her pants, she was subjected to
16 many incidents of sexually inappropriate behavior from Appellant. This behavior included
17 Appellant sitting in a chair with his legs spread and saying, "Yo baby, come on baby, come on
18 baby." In 1990, she reported this to her supervisor, John Timmerman. Ms. Dickson testified that
19 she was subjected to incidents of sexually inappropriate behavior from Appellant when she was
20 opening doors with her keys and Appellant would come up behind her and rubbed his genitals
21 against her. In 1993, she reported this behavior to Mr. Timmerman. Ms. Dickson stated that Mr.
22 Timmerman did nothing to follow up on her complaints.

23 3.11 In addition, Ms. Dickson testified that Appellant would stare at her chest, which she also
24 reported to Mr. Timmerman. She further testified that when she was cleaning the showers,
25 Appellant would turn off the lights; and that when she was scrubbing, he would come up behind her
26 and sniff her behind. Ms. Dickson testified that she reported these incidents to Bonnie Chandler

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1 who was her supervisor after Mr. Timmerman. Ms. Dickson stated that all of these incidents
2 occurred in Perham.

3
4 3.12 Ms. Dickson testified that she felt very uncomfortable when she was around Appellant. She
5 stated that because she had heard Appellant comment about “blowing away” Tony Rogers, she was
6 afraid that he might blow her away because of her big mouth. Ms. Dickson indicated that Gordon
7 Lemper and Janet Styer also heard Appellant’s comment about Tony Rogers. Ms. Dickson further
8 testified that Appellant is a very quiet person, that she has never heard him use bad words, and that
9 he does not swear in front of her very often. (Testimony of Victoria Dickson).

10
11 3.13 Gordon Lemper, Custodian, works with Appellant and Ms. Dickson. He stated that Ms.
12 Dickson made false accusations against him. He further stated that he had seen Ms. Dickson
13 engage in sexually inappropriate behavior around Appellant but he never saw Appellant
14 inappropriately touch Ms. Dickson. Mr. Lemper testified that he did not hear Appellant make a
15 comment about “blowing away” Tony Rogers. (Testimony of Gordon Lemper).

16
17 3.14 Janet Styer, Custodian, worked with Appellant and Ms. Dickson. She testified that
18 custodians usually changed their clothes in the restrooms. Ms. Styer feels that it would have been
19 inappropriate to change clothes in the linen room because the linen room was accessible to anyone
20 on staff who had keys to the room. Ms. Styer testified that it was common for Ms. Dickson to
21 engage in sexually inappropriate behavior around Appellant and others but she has never observed
22 Appellant act inappropriately. In addition, Ms. Styer testified that she did not hear Appellant make
23 a comment about “blowing away” Tony Rogers. (Testimony of Janet Styer).

1 3.15 Rosemary Larkin, Custodian, has observed Ms. Dickson behave inappropriately around
2 students and other custodians. She testified that she has never observed Appellant behave
3 inappropriately and that she has never heard Appellant swear. (Testimony of Rosemary Larkin).

4
5 3.16 Cornelio Ruiz, Transportation Supervisor, testified that Ms. Dickson has behaved in a
6 sexually inappropriate manner toward him and other toward one of his subordinates. Mr. Ruiz has
7 never seen Appellant behave inappropriately toward Ms. Dickson. (Testimony of Cornelio Ruiz).

8
9 3.17 The testimony of other witnesses established that Appellant was never observed behaving in
10 a sexually inappropriate manner and that Ms. Dickson has been observed both behaving
11 inappropriately and using inappropriate language. (Testimony of Kay Olson, Gail Ann Carpenter,
12 and Gary Clausen).

13
14 3.18 Appellant testified that he has been employed at WSU for 17 1/2 years and that other than a
15 seven day suspension in 1989, he has received no formal disciplinary actions. Appellant testified
16 that neither Mr. Timmerman nor Ms. Chandler had spoken to him about the previous alleged reports
17 made by Ms. Dickson about his behavior. Mr. Lawson has observed Ms. Dickson engage in
18 sexually inappropriate behavior. On one occasion, Ms. Dickson was acting inappropriately in front
19 of Appellant when he was sitting in a chair. In response to Ms. Dickson's actions, Appellant
20 admittedly spread his arms and legs and said, "Come on baby." (Testimony of Appellant).

21
22 3.19 Ernest Renfro is the Assistant Vice President for Business Affairs and Controller for WSU.
23 He is the appointing authority for the Custodians. After Mr. Tattershall brought the incidents raised
24 by Ms. Dickson to Mr. Renfro's attention, on July 11, 1996, Mr. Renfro met with Ms. Dickson.
25 Ms. Dickson told him about the incidents and indicated that Appellant had been harassing her for
26

1 four to five years and that the incidents occurred about three or four times a week. Mr. Renfro
2 testified that Ms. Dickson was very upset and emotional but that he did not feel that Ms. Dickson
3 was reluctant about coming forward with the allegations against Appellant. Although Ms. Dickson
4 indicated that she had reported previous incidents to Mr. Timmerman and Ms. Chandler, Mr. Renfro
5 did not check with them about the prior reports. (Testimony of Ernest Renfro).

6
7 3.20 On July 16, 1996, Mr. Renfro held a pre-disciplinary meeting. Mr. Lawson responded to the
8 information presented during the meeting by memorandum dated July 16, 1996. (Exh. R-2). Mr.
9 Renfro testified that on July 18, 1996, Mr. Renfro met with Janet Styer, Custodian; Linda
10 McConnell, Custodian; Mel Mundell, Custodian; Bonnie Chandler, Custodial Supervisor; and Tony
11 Rogers, Custodial Supervisor. Mr. Renfro testified that it was very difficult to make the decision to
12 terminate Appellant. However, based on the information he had gathered, he felt that he was
13 dealing with a volatile situation, employees were very upset, the incidents of harrassment had been
14 ongoing, and the situation was having a negative impact on the University's ability to function.
15 Appellant had a previous disciplinary action consisting of a seven day suspension for similar
16 activities. Mr. Renfro felt that Appellant's behavior was totally unacceptable, that Appellant had
17 singled out Ms. Dickson for his harrassment, and that as a result, termination was the appropriate
18 disciplinary action. (Testimony of Ernest Renfro).

19
20 3.21 Ms. Dickson provided additional testimony on issues related to the charges against
21 Appellant as well as on issues not directly related to the charges. For example, she testified that her
22 husband did not have a temper. However, she also testified that he was very angry when she told
23 him about the June 19, 1996, incident with her pants and she was afraid that he would come to her
24 work site and start a fight. She testified that she and her husband had arguments and that on one
25 occasion during an argument she called the police about her husband. Ms. Dickson testified that
26

1 she never lied to her husband. However, she also testified that she told her husband that she had
2 talked to her supervisor about the July 19, 1996, incident when she had not. Ms. Dickson testified
3 that the incidents of Appellant's sexually inappropriate behavior occurred once a month or a couple
4 times a week. However, Ernest Renfro testified that Ms. Dickson told him that the incidents
5 occurred about three or four times a week.

7 **IV. ARGUMENTS OF THE PARTIES**

8 4.1 Respondent argues that based on a preponderance of the credible evidence, the disciplinary
9 sanction should be affirmed. Respondent contends that Appellant's sexually inappropriate behavior
10 was ongoing, that he had a prior disciplinary action of a similar nature, that he had attended sexual
11 harassment training, and that his behavior had a negative effect on the work environment.
12 Respondent asserts that the compelling and credible testimony of its witnesses, including Ms.
13 Dickson, prove that Appellant committed the allegations outlined in the disciplinary letter and that
14 dismissal is the appropriate sanction.

15
16 4.2 Appellant argues that nothing in the record substantiates that immediate dismissal is
17 appropriate under the provisions WAC 251-11-070. Furthermore, Appellant argues that the charges
18 in the disciplinary letter are not supported by a preponderance of the evidence and dismissal is not
19 appropriate. Appellant argues that the testimony presented supports Appellant's defense and
20 establishes that Ms. Dickson's claims should not be believed. Appellant contends that Ms. Dickson
21 has a history of making false claims against other employees, that Ms. Dickson is a victim of
22 domestic violence who is afraid of her husband becoming violent, and that Ms. Dickson admitted
23 that she lied to her husband. Appellant asserts that Ms. Dickson is not a credible witness.
24 Appellant also asserts that he should be reinstated or at a minimum, that the disciplinary sanction
25 should be reduced.

V. CONCLUSIONS OF LAW

5.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter herein.

5.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting the charges upon which the action was initiated by proving by a preponderance of the credible evidence that Appellant committed the offenses set forth in the disciplinary letter and that the sanction was appropriate under the facts and circumstances. WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084 (1983).

5.3 Gross misconduct is flagrant misbehavior which adversely affects the agency's ability to carry out its functions. Rainwater v. School for the Deaf, PAB No. D89-004 (1989).

5.4 Abuse of fellow employees is established when it is shown that the employee wrongfully or unreasonably treats another by word or deed. Johnson v. Lower Columbia College, PAB No. D93-077 (1994).

5.5 Neglect of duty is established when it is shown that an employee has a duty to his or her employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Dep't of Social & Health Services, PAB No. D86-119 (1987).

5.6 Insubordination is the refusal to comply with a lawful order or directive given by a superior and is defined as not submitting to authority, willful disrespect or disobedience. Countryman v. Dep't of Social and Health Services, PAB No. D94-025 (1995).

1
2 5.7 Willful violation of published employing agency or institution or Personnel Resources
3 Board rules or regulations is established by facts showing the existence and publication of the rules
4 or regulations, Appellant's knowledge of the rules or regulations, and failure to comply with the
5 rules or regulations. A willful violation presumes a deliberate act. Skaalheim v. Dep't of Social &
6 Health Services, PAB No. D93-053 (1994).

7
8 5.8 Although it is not appropriate to initiate discipline based on prior formal and informal
9 disciplinary actions, including letters of reprimand, it is appropriate to consider them regarding the
10 level of the sanction which should be imposed here. Aquino v. University of Washington, PAB No.
11 D93-163 (1995).

12
13 5.9 In determining whether a sanction imposed is appropriate, consideration must be given to
14 the facts and circumstances, including the seriousness and circumstances of the offenses. The
15 penalty should not be disturbed unless it is too severe. The sanction imposed should be sufficient to
16 prevent recurrence, to deter others from similar misconduct, and to maintain the integrity of the
17 program. An action does not necessarily fail if one cause is not sustained unless the entire action
18 depends on the unproven charge. Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).

19
20 5.10 The Board must carefully weigh the credibility of witnesses in reaching its conclusions. In
21 this case, where there were no witnesses to the alleged misconduct, we must rely on the testimony
22 of Ms. Dickson to substantiate the charges. The evidence establishes that Ms. Dickson has been
23 inconsistent about the frequency of the alleged incidents and that she contradicted herself during her
24 testimony before the Board. Therefore, we do not find Ms. Dickson to be a credible witness and we

1 cannot concluded that the allegations of misconduct are supported by a preponderance of the
2 credible evidence.

3
4 5.11 Appellant has admitted that on one occasion, he reacted to Ms. Dickson's actions by
5 spreading his arms and legs and saying "Come on baby." Appellant has been trained about sexual
6 harassment and should have been aware that his response to Ms. Dickson was inappropriate. Based
7 on this admitted incident alone, a disciplinary sanction is warranted. Appellant was previously
8 disciplined with a seven-day suspension. The proven facts in this case support a disciplinary
9 sanction of a 15 working-day suspension. A suspension of this duration is sufficient to prevent
10 recurrence, to deter others from similar misconduct, and to maintain the integrity of the University's
11 program. Therefore, under the facts and circumstances of this case, we conclude that the appeal
12 should be granted in part and the disciplinary sanction of dismissal should be modified.

13
14 **VI. ORDER**

15 NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of William Lawson is granted in
16 part, the disciplinary sanction of dismissal is modified, and Appellant William Lawson is suspended
17 for 15 working days.

18
19 DATED this _____ day of _____ 1998.

20 **WASHINGTON STATE PERSONNEL APPEALS BOARD**

21
22 _____
Howard N. Jorgenson, Vice Chair

23
24 _____
Roger F. Sanford, Member

25
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